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No. 82-8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

RESPONSE TO MOTION TO DISMISS OR AFFIRM

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Appellee misstates the decision appealed from and misinterprets the cases and statutes referred to in the Jurisdictional Statement. The decision appealed from and the "Goggin II" rule

by which the court felt itself bound, are specifically based upon federal limitations on the power of the state to tax. Further, the California use tax, like the taxes in issue in the Leavy and Hatfield cases is upon the purchaser. Therefore, this case directly conflicts with the second and fifth circuits.

I

COURT OF APPEALS DECISION APPEALED FROM HELD THE CALIFORNIA USE TAX INVALID UNDER FEDERAL LAW

This is clearly shown by the following statements contained in the Memorandum decision in the court below (Appen. A to Juris. Stmt.):

> ". . . [The Goggin] cases lay down the law of this circuit that where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax." (pp. A-3 - A-4.)

> ". . . [T]he Supremacy Clause limits local tax burdens on federal officials. Based on this principle this court held

that either a sales or a use tax 'constitutes an unlawful interference with the process of the court of bankruptcy and is invalid.' Goggin II, supra, at 46." (p. A-4.)

"In Goggin II, this court held that [28 U.S.C.] § 960 'designated sales in the course of operation of a business as the sole area' where the state may impose a tax." (p. A-5, emphasis added.)

"Goggin I and Goggin II are the controlling precedent in this circuit. . . . Under Goggin, the state may not impose [the tax here]." (pp. A-5 - A-6.)

"While we deem ourselves bound by Goggin I and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings [citing Hatfield and Leavy]." (pp. A-5 - A-7.)

The above quoted language in the lower court's decision here makes it clear that it was based upon a determination

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. . .

. . .

that federal law precluded[1/] California from imposing its sales or use tax.

The Goggin II decision upon which the decision below was based also clearly voided any California tax by reason

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1. To the extent that Goggin I may be construed as holding (in 1951) that California law did not tax a sale which puts an end to a retail business, this clearly does not represent California law today. Such sales are clearly taxable under the California Sales and Use Tax Law. (See U.S. Industries, Inc. v. State Board of Equalization (1962) 198 Cal.App.2d 775; Davis Wire Corp. v. State Bd. of Equalization (1976) 17 Cal.3d 761 (holding sales of entire businesses by retailers to be taxable); Calif. Rev. & Tax. Code, § 6019 (tax applies to receivers, trustees and other fiduciaries); 18 Cal. Admin. Code § 1595, par. (b)(1) "Tax applies to that portion of the gross receipts from the sale of a business that is attributable to the transfer of tangible personal property held or used in the course of activities requiring holding of a seller's permit . . . and acquired by the purchaser for use rather than resale.") There can be no serious contention that California law does not tax transfer of tangible personal property as here where it is transferred as a transfer of the entire business which terminates the business operation by the selling owner.

of federal bankruptcy law. That opinion stated,

> " . . . any impost upon the essential liquidation process of the bankruptcy court is void. . . . no burden could be placed on a liquidating sale in bankruptcy. (245 F.2d 44 at p. 45)
>
> [also]
>
> "Any act which hinders, delays or burdens the accomplishment of [liquidation] . . . constitutes an unlawful interference with the process of the court of bankruptcy and is invalid. . . . The tax in question was declared invalid because it burdened this essential process." (Ibid, at p. 46.)

There is no doubt that the lower court decision held a California use tax on the transaction in issue to be unlawful under federal law. Accordingly, SBE properly appealed under 28 U.S.C. section 1254 (2).[2/]

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2. If, for any reason, the court concludes that an appeal is not proper, the Jurisdictional Statement filed herein should be regarded and acted on as a Petition for Certiorari. (28 U.S.C., § 2103.)

II

THE CALIFORNIA USE TAX IN ISSUE HERE IS A TAX ON THE PURCHASER JUST AS THE TAXES IN ISSUE IN THE LEAVY AND HATFIELD CASES; THIS DECISION DIRECTLY CONFLICTS WITH THE SECOND AND FIFTH CIRCUITS

Appellee asserts that there is no conflict among circuits because (appellee claims) that the "legal incidence" of the taxes under consideration by the second and fifth circuits was on the purchaser, while the California "sales/use" tax is not a tax on the purchaser. (Motn to Dismiss or Affm, p. 3.) Appellee is simply wrong.

The California use tax is clearly imposed on the purchaser. (Calif. Rev. & Tax. Code, § 6201; Bank of America v. State Bd. of Equalization (1962) 209 Cal. App.2d 780,792.) Like the California use tax, the taxes in issue in Leavy and

Hatfield obligated the retailer to collect and remit them. (In re Hatfield Const. (1974) 494 F.2d 1179, 1180; In re Leavy (1936) 85 F.2d 25, 26.) All three sales were "liquidation" sales. It is respectfully submitted that this case is in direct conflict with the second and fifth circuits in all material respects. A ruling by this Court is necessary to restore uniformity among the states in the taxation of such sales.

CONCLUSION

Appellee's contentions on which it bases its Motion to Dismiss or Affirm are simply wrong. The court below did hold that under federal law, the imposition of the California use tax is invalid. The decision below is in direct conflict with the decisions of the second and fifth circuits. Such conflict can be resolved only by this Court. This Court should note

probable jurisdiction in this case in order to restore uniformity in application of federal law to the power of the states to tax in this field.

Respectfully submitted,

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